

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SEVENTH REGION**

FIRE RITE, INC.¹

Employer

and

Case 7-RD-3536

DANNY AVERITT, An Individual

Petitioner

and

**TRUCK DRIVERS LOCAL 299, INTERNATIONAL BROTHERHOOD
OF TEAMSTERS²**

Union

APPEARANCES:

Kenneth M. Gonko, Attorney, of Chesterfield, Michigan, for the Employer
Danny Averitt, of Roseville, Michigan, pro se
Matthew Broderick, Attorney, of Madison Heights, Michigan, for the Union

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding,³ the undersigned finds:

¹ The Employer's name appears as amended at the hearing.

² The Union's name appears as amended at the hearing.

³ The Employer and Union filed briefs, which were carefully considered.

1. The hearing officer's rulings are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction.

3. The labor organization involved claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

Overview

The Union represents a bargaining unit, herein the Unit, consisting of all full-time and regular part-time truck drivers, straight truck drivers, general maintenance employees, maintenance employees, utility employees, straightening employees, painters, shop leaders, general labor employees, and janitors employed out of the Employer's facility at 13801 Linden Avenue, Detroit, Michigan; but excluding guards and supervisors as defined in the Act, and all other employees.⁴ The most recent collective bargaining agreement was effective through June 30, 2006.

The sole issue is whether the Petitioner, Averitt, is a supervisor. The Union contends that the petition should be dismissed because Averitt is a statutory supervisor. The Employer and Averitt argue that Averitt is an employee, not a supervisor.

For the reasons set forth below, I find the Union has not satisfied its burden of proof that Averitt exercises any supervisory indicia enumerated in Section 2(11) of the Act with the independent judgment required for a finding of supervisory status. Therefore, he is not a statutory supervisor within the meaning of the Act, was eligible to file the instant petition, and is eligible to vote.

Employer's Operations

The Employer operates a heat treatment facility, involving the painting, blasting, straightening and stress relief of metals, as well as related repair work.

⁴ The list of classifications included in the Unit appears as amended at hearing.

The Employer does not fabricate parts itself, but rather treats customer-supplied parts. The Employer's operation is overseen by President Dave Yovich and Vice President Christina Saeegh.⁵ The Employer had employed a plant manager, Reggie Johnson. Johnson had the authority to independently hire, fire and discipline employees. Johnson left the Employer between one to two years ago. Upon Johnson's departure, Yovich assumed his responsibilities. There are four shop leaders, including Averitt, who report directly to Yovich and Saeegh.⁶ There are two shop leaders on the day shift, including Averitt, and one each on the afternoon and night shift. The shop leaders oversee the work of approximately 22 production employees. There are 14 Unit employees employed on the day shift, not including the two shop leaders. There are three Unit employees employed on the afternoon shift, not including one shop leader. There are five Unit employees employed on the night shift, not including one shop leader. The Employer also employs three non-Unit clerical employees, who are located in the office area.

Generally, the Employer obtains its work when a customer calls one of the clerical employees, requesting that its parts be picked up. The clerical employees notate the pick-up information, which includes the customer's name, and the weight and dimensions of the parts being picked up, so that the Employer can ascertain what size truck to send. A driver is then dispatched to pick up the customer's parts and bring them back to the plant. The parts are logged in by the clerical staff and the work is given a sequential order number. Next, a clerical employee creates a shipper document, detailing the work to be done and the shipper then goes into the plant for production. In most instances, work is processed by date received. Sometimes exceptions are made if a customer needs a part in a hurry or if there is another process being performed on a part, such as machining, necessitating that the part be sent to another employer's facility.

Employees are notified of work assignments via a chalk board in the production area, which essentially reiterates production information from a customer's shipper. The chalk board is also used as a means of communication for employees between the three shifts. The shop leader of a particular shift typically is responsible for writing on the chalk board.

Averitt's Job Responsibilities

Averitt has been employed by the Employer approximately nine years.

⁵ The parties stipulated, and I find, that Yovich and Saeegh are managerial employees, as they both have the ability to formulate and effectuate management policies and use their own discretion with respect to all facets of the Employer's operations.

⁶ The Union does not contest the employee status of any of the other three shop leaders.

He was promoted to shop leader by Yovich in 2005. He remains in the Unit, continues to pay dues, and has the right to resort to the grievance procedure. He began his employment as a truck driver and continues to drive a truck between 5-30% of his total weekly hours, depending on the Employer's need. The majority of Averitt's time is spent within the plant, keeping track of the work orders being performed by first shift employees and, on occasion, dispatching employees.

Work Assignments

Averitt writes down the job orders on the chalk board. The information written on the board is derived from the shippers provided by the clerical staff. Because orders are frequently processed in numerical order, orders are usually given out to employees in the order received from the customer. On occasion, Averitt writes an order out of sequence on the board. He does this if a customer requires priority treatment, particularly if a part requires additional work by another non-Employer facility. Averitt only does this upon the instruction of Saeegh or Yovich. Work is typically sent to specific classifications, such as painters, straighteners, and general laborers, for completion. Averitt is often paged by Saeegh when she wants to check on the status of a job. He is also in frequent contact with Yovich.

As part of his duties, Averitt also reviews completed jobs. If, upon inspection, he sees a part that needs paint touch-up, he does it himself or informs the painter that a touch-up is needed. To some extent, all employees inspect work in the same way.

Dispatching employees

Averitt's dispatching duties consist of answering a customer's call concerning what time an order will be ready and then checking to see which of five drivers is closest to the pick-up location and/or which driver has room on his truck. Averitt then dispatches the appropriate driver to the customer's facility for pick-up. The Employer's clerical staff also arranges pick-ups and deliveries in the same manner.

Assigning overtime-granting time off

Averitt, upon the instruction of Yovich, on occasion calls employees at their homes for weekend overtime work. Employees are called for overtime based upon seniority, as outlined under Article 30 of the parties' collective bargaining

agreement. Weekend overtime is voluntary. Union steward Kenny Reardon testified that on one unspecified occasion he asked Yovich for a day off and Yovich replied that Yovich needed to see what Averitt had "set up." The record does not indicate what happened after that.

Discipline of employees

The Employer states that Averitt has no authority to discipline employees. About one year ago, the Employer asked the Union about giving shop leaders the ability to write up and discipline Unit employees. The Union said no and no change was made.

In late June or early July 2006, Averitt instructed employee Roger Campbell to go to the blast room because some parts needed to be blasted. Campbell had returned to work from an on-the-job injury and had a medical work restriction. He informed Averitt that he would go, but might reinjure his shoulders. Averitt, without commenting, went into the office area. Averitt returned shortly thereafter with Campbell's restriction in hand. He told Campbell his restriction was "up." Averitt left. A few minutes later, Yovich walked into the area and suspended Campbell. Saeegh testified that she made the decision to suspend Campbell after speaking with Yovich. She did not speak with Averitt. Averitt denied that he recommended that Campbell be suspended. A grievance was filled and Campbell was returned to work. Averitt has no role in the grievance procedure.

Wages, Benefits, and Other Secondary Indicia

Shop leader is a classification within the contract between the Employer and Union. The most recent contract set the rate of pay for all four shop leaders at \$16.90 per hour. The pay range for Unit employees is between \$10.65 per hour for janitors to \$18.65 per hour for maintenance employees. Averitt punches a time card in the same manner as all Unit employees. A seniority list provided to the Union by the Employer in May 2006 classified Averitt and the other three shop leaders as "supervision." Averitt wears the same uniform as all Unit employees, consisting of an Employer-issued shirt and either Employer-issued pants or jeans. Averitt did not undergo any type of training upon his promotion from driver to shop leader nor does he attend any management meetings. At hearing, the Union presented a request for a quote from a customer directed to either Averitt or Yovich. When Union Business Agent Toiale Johnson calls Yovich, he is often transferred to Averitt. He then asks Averitt if he can speak with Yovich, and Averitt puts Johnson on hold and gets Yovich to the phone.

Reardon and Campbell testified that they perceive Averitt to be a supervisor. Both noted that Averitt has his own desk, consults with Yovich throughout the day, and is paged many times during his shift. Reardon further based his assessment upon Averitt writing assignments on the board, other shop leaders asking Averitt whether to put particular pieces in the furnace, and other employees consulting with him about machinery breakdowns or about what work is coming into the facility. On one occasion, Yovich told Reardon that Averitt was in charge when he left on vacation. There is no record evidence as to when this occurred, how long Yovich was gone, or what Averitt did in his absence. Moreover, there is nothing in the record as to whether Averitt was, in fact, in charge or had any additional authority or duties while Yovich was on vacation. Finally, Reardon testified that on some unspecified date, Yovich commented that he could pay Averitt to work a supervisor's position without having to hire a supervisor. Reardon replied that Averitt is a leader, not a supervisor.

Analysis

The Board has long held that statutory supervisors are precluded from filing decertification petitions. *Doak Aircraft Co.*, 107 NLRB 924 (1954). The Board noted that Section 9(c)(1)(A), which provides for the right to file a decertification petition, refers only to "employees" filing such petitions. *Id.* at 926. Declaring that one purpose of the Act was to delineate supervisors as representatives of management, the Board concluded that permitting supervisors to act as employee representatives by filing such petitions would defeat the Act's purpose because supervisors would then be faced with a divided allegiance to the employees and to management. *Id.* at 926-927. Thus, if Averitt is a supervisor, the petition should be dismissed.

Section 2(11) of the Act defines a "supervisor" as:

...any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, promote, discharge, assign, reward, or discipline other employees or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The primary supervisory indicia enumerated in Section 2(11) of the Act are read in the disjunctive, so that possession of any one of the 12 listed authorities

can invest an individual with supervisory status. *Ohio Power Co. v. NLRB*, 176 F.2d 1098, 1100 (6th Cir. 1949), cert. denied 338 U.S. 899 (1949); *Allen Services Co.*, 314 NLRB 1060, 1061 (1994). The burden of proof rests with the party seeking to exclude the individual as a supervisor, in this case the Union. *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 711-712 (2001); *Benchmark Mechanical Contractors, Inc.*, 327 NLRB 829 (1999). Any lack of evidence in the record is construed against the party asserting supervisory status. *Elmhurst Extended Care Facilities, Inc.*, 329 NLRB 535, 536 (1999). Conclusionary statements, without supporting evidence, do not establish supervisory authority. *Sears, Roebuck and Co.*, 304 NLRB 193 (1991). The Board is mindful not to deprive employees of their rights under Section 7 by interpreting the term supervisor too broadly. *Unifirst Corp.*, 335 NLRB 706, 712-713 (2001); *Willimston Piggly Wiggly v. NLRB*, 827 F.2d 1098, 1100 (6th Cir. 1987). Therefore, to separate straw bosses from true supervisors, the Act prescribes that the exercise of a supervisory indicium be in the interest of the employer and require the use of independent judgment. This means that neither the discharge of Section 2(11) functions in a routine or clerical manner, nor use of independent judgment to solve problems unrelated to Section 2(11) functions, qualifies as supervisory. *Alois Box Co.*, 326 NLRB 1177 (1998).

As shop leader, Averitt does not have the power to hire, fire, discipline, suspend, lay off, recall, promote, or reward employees. The Union contends that Averitt assigns work to bargaining unit employees based upon his assessment of their capabilities and shifting priorities at the Employer's facility. It further contends that he assigns overtime and grants time off, effectively recommends discipline, and is viewed by other employees as a supervisor.

As evidence of its claims, the Union points to the departure of acknowledged supervisor Johnson. It asserts that Averitt stepped into Johnson's role at the facility and assumed Johnson's supervisory authority. However, Saeegh testified that Yovich did not give Averitt such authority and instead assumed that authority himself. The Union presented insufficient evidence to the contrary. In fact, the record contains no link in time between the departure of Johnson and promotion to shop leader of Averitt.

Assign and responsibly direct

Averitt notates on a chalk board work assignments taken directly from shippers provided to him by the clerical staff and only alters the numerical order of the shippers at the direction of Yovich and Saeegh. There was no evidence presented that Averitt uses any discretion as to whom work is assigned.

Moreover, it does not appear that Averitt's duties with respect to assigning work differ from that of other shop leaders. Assignment and direction of employees does not constitute supervisory authority when exercised in a routine manner or circumscribed by management directives or a collective bargaining agreement. *Dynamic Science, Inc.*, 334 NLRB 391 (2001); *Chevron Shipping Co.*, 317 NLRB 379, 381 (1995).

Averitt inspects parts and sometimes requests that parts be repainted. However, generally pointing out mistakes or the correct way to perform a task does not confer supervisory status. *Franklin Home Health Agency*, 337 NLRB 826, 831 (2002). Moreover, giving minor orders during the course of a weekday does not necessarily make an employee a supervisor. *Providence Hospital*, 320 NLRB 717, 725 (1996), citing *NLRB v. Security Guard Service*, 384 F.2d 143, 151 (5th Cir. 1967).

Regarding Averitt's assignment of Campbell to the blast room, there was no evidence presented as to whether Campbell was scheduled to work in the blast room on the day in question. Thus, it is unclear as to whether Averitt assigned new work to Campbell, merely reiterated Campbell's already scheduled assignment, or directed Campbell to the blast room per instructions of Yovich or Saeegh.

Overtime-Time Off

The record clearly demonstrates that Averitt does not exercise any supervisory authority with respect to calling employees for weekend overtime work. He makes the calls at the direction of Yovich. Further, the calls are made pursuant to the terms of the collective bargaining agreement concerning overtime, and weekend overtime is voluntary. Seeking volunteers to work overtime does not constitute supervisory authority. See *Youville Health Care Center, Inc.*, 326 NLRB 495, 496 (1998).

There is also insufficient evidence that Averitt has the authority to approve time off. Although Reardon testified that Yovich had commented that he needed to see what Averitt had "set up" before he could approve his time off, such a statement is inconclusive as to Averitt's supervisory status. Both Union and Employer witnesses, as well as Averitt himself, testified that Averitt only "sets up" work to the extent that he reiterates on a chalk board the information contained in the customer's shipper. As discussed earlier, any deviation from the orders being listed numerically must be approved by Yovich or Saeegh.

Recommendation of Discipline

The Union asserts that Averitt makes effective recommendations on discharges, citing the suspension of Campbell as support for its contention. The record is far from sufficient to establish that Averitt makes effective recommendations on discharges. Averitt made no comment to Campbell after Campbell informed him that he might reinjure his shoulder. The record is insufficient to establish that Averitt did anything other than report the incident to the Employer. See *Illinois Veterans Home at Anna L.P.*, 323 NLRB 890 (1997)(merely reporting incidents resulting in discipline is not indicative of supervisory status); *The Ohio Masonic Home, Inc.*, 295 NLRB 390, 394 (1989).

Secondary Indicia

The Union relies on several secondary indicia to contend that Averitt is a supervisor. However, while nonstatutory indicia can be used as background evidence on the question of supervisory status, such indicia is not itself dispositive of the issue in the absence of evidence indicating the existence of one of the primary or statutory indications of supervisory status. See *Chrome Deposit Corp.*, 323, NLRB 961, 963 fn. 9 (1997); *Shen Automotive Dealership Group*, 321 NLRB 586, 594 (1996).

With respect to the seniority list provided to the Union by the Employer in May 2006 that classified Averitt and the other three shop leaders as "supervision," when the Employer provided the Union with the list during negotiations, Saeegh specifically told the Union that the term "supervisor" did not indicate that shop leaders were supervisors, but rather that the designation was used due to the limitations of the Employer's payroll software, which did not allow the Employer to use the term "shop leader" for that classification.

The Union also asserts that Averitt has ostensible or apparent supervisory authority, and employees perceive Averitt to be a supervisor. In its brief, the Union cites *Poly-America, Inc.*, 328 NLRB 667 (1999), for the proposition that the Board has held that ostensible or apparent supervisory authority can be the basis for making a supervisory determination. However, that case is inapposite. In *Poly-America, Inc.*, the Board found, in the context of an organizing campaign, that apparent authority made certain individuals agents of the Employer. The case did not deal with whether the individuals were statutory supervisors.

The Union also cites *The Bama Co.*, 145 NLRB 1141 (1964), where the Board gave some weight to the fact that employees looked upon the individual in

question as a supervisor and there was a valid basis for such judgment on their part. However, the proper consideration is whether the functions, duties and authority of an individual meet any of the criteria for supervisory status defined in Section 2(11) of the Act. ***Waterbed World***, 286 NLRB 425, 426 (1987). In ***The Bama Co.***, the Board found that the individual in question had actual supervisory authority. The holding out of an individual as a supervisor is not necessarily dispositive of supervisory status. ***Williamette Industries***, 336 NLRB 743 (2001); ***Carlisle Engineered Products***, 330 NLRB 1359 (2000) (rank and file employees cannot be transformed into supervisors merely being invested with that title). Here, Averitt does not have actual supervisory authority.

Moreover, the record reveals that other, if not all, shop leaders write on the chalk board in the very same manner as Averitt, and that almost all employees use Averitt's desk to make phone calls, among other things. Further, even though the Union contends that Yovich told Reardon that Averitt was in charge while Yovich was on vacation, the Union provided no evidence that Averitt was placed in charge or exercised any supervisory authority during Yovich's absence. In addition, the possible isolated substitution as a supervisor by Averitt on one occasion is not sufficient to establish supervisory status. ***Latas De Aluminio Reynolds, Inc.***, 276 NLRB 1313 (1985). As to Yovich's statement to Reardon regarding making Averitt a supervisor, Reardon himself reiterated to Yovich that Averitt is a leader, not a supervisor.

Averitt being paged over the facility's intercom during the work day also does not establish supervisory status. The evidence indicates that he is merely communicating with Saeegh about the status of jobs or getting directions from Yovich. The Union also attaches significance to a customer's request for a price quote faxed to the Employer's facility to the attention of Averitt or Yovich. However, it presented no evidence that Averitt did anything with respect to the request. Averitt testified that he had never seen the price quote. Even assuming that he had, receiving a request for pricing from a customer does not in and of itself invoke any of the supervisory indicia as set forth in the Act.

Conclusion

Based upon the above and the record as a whole, I conclude that the Union has not met its burden of proof with respect to its contention that Averitt is a supervisor as defined in the Act. Many of its assertions were conclusionary, without supporting evidence. ***Sears, Roebuck & Co.***, 304 NLRB 193 (1991). Thus, the petition shall not be dismissed.

5. I find that the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining with the meaning of Section 9(b) of the Act:

All full-time and regular part-time truck drivers, straight truck drivers, general maintenance employees, maintenance employees, utility employees, straightening employees, painters, shop leaders, general labor employees, and janitors employed by the Employer at or out of its facility at 13801 Linden Avenue, Detroit, Michigan; but excluding guards and supervisors as defined in the Act, and all other employees.

Those eligible to vote shall vote as set forth in the attached Direction of Election.

Dated at Detroit, Michigan, this 10th day of August 2006.

(SEAL)

"/s/[Stephen M. Glasser]."

/s/ Stephen M. Glasser

Stephen M. Glasser, Regional Director
National Labor Relations Board – Region 7
Patrick V. McNamara Federal Building
477 Michigan Avenue – Room 300
Detroit, Michigan 48226

DIRECTION OF ELECTION

An election by secret ballot shall be conducted under the direction and supervision of this office among the employees in the unit(s) found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those employees in the unit(s) who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such a strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Employees who are otherwise eligible but who are in the military service of the United States may vote if they appear in person at the polls. Ineligible to vote are 1) employees who quit or are discharged for cause after the designated payroll period for eligibility, 2) employees engaged in a strike, who have quit or been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and 3) employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by:

TRUCK DRIVERS LOCAL 299, INTERNATIONAL BROTHERHOOD OF TEAMSTERS

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969); *North Macon Health Care Facility*, 315 NLRB 359 (1994). Accordingly, it is hereby directed that **within 7 days** of the date of this Decision, **2** copies of an election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. The list must be of sufficient clarity to be clearly legible. The list may be submitted by facsimile or E-mail transmission, in which case only one copy need be submitted. In order to be timely filed, such list must be received in the **DETROIT REGIONAL OFFICE** on or before **August 17, 2006**. No extension of time to file this list shall be granted except in extraordinary

circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the **Executive Secretary, Franklin Court, 1099 14th Street N.W., Washington D.C. 20570**. This request must be received by the Board in Washington by **August 24, 2006**.

POSTING OF ELECTION NOTICES

a. Employers shall post copies of the Board's official Notice of Election in conspicuous places at least 3 full working days prior to 12:01 a.m. of the day of the election. In elections involving mail ballots, the election shall be deemed to have commenced the day the ballots are deposited by the Regional Office in the mail. In all cases, the notices shall remain posted until the end of the election.

b. The term "working day" shall mean an entire 24-hour period excluding Saturday, Sundays, and holidays.

c. A party shall be estopped from objecting to nonposting of notices if it is responsible for the nonposting. An employer shall be conclusively deemed to have received copies of the election notice for posting unless it notifies the Regional Office at least 5 days prior to the commencement of the election that it has not received copies of the election notice. */

d. Failure to post the election notices as required herein shall be grounds for setting aside the election whenever proper and timely objections are filed under the provisions of Section 102.69(a).

*/ Section 103.20 (c) of the Board's Rules is interpreted as requiring an employer to notify the Regional Office at least 5 full working days prior to 12:01 a.m. of the day of the election that it has not received copies of the election notice.